

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

FILE: B-220056.2 **DATE:** January 23, 1986
MATTER OF: Inter Systems, Inc.

DIGEST:

Where protester, the incumbent contractor, alleges bad faith on the part of agency officials in their failure to consider it for a follow-on section 8(a) contract but fails to offer irrefutable proof in support of the allegation, the protester has not met its burden of proof. The protest therefore is denied.

Inter Systems, Inc. (ISI), a minority-owned small business concern, protests the Environmental Protection Agency's (EPA) failure to consider ISI for a follow-on to its section 8(a) contract to provide technical support for the operation and maintenance of the Office of Research and Development Information System. ISI, the incumbent contractor, contends that the EPA deliberately, and in bad faith, led ISI to believe that its contract performance was satisfactory, that ISI detrimentally relied on this belief and that the EPA should, therefore, be required to consider ISI for the follow-on section 8(a) contract.

The protest is denied.

Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1982), authorizes the Small Business Administration (SBA) to enter into contracts with government agencies and to arrange for the performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns. The thrust of the section 8(a) program is to insulate participants from open price competition with established firms until the section 8(a) firms are capable of so competing. See Winfield Mfg. Co., Inc., B-218537, June 12, 1985, 85-1 CPD ¶ 679. SBA and

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contracting agencies enjoy broad discretion in arriving at section 8(a) contracting arrangements and, therefore, our review of actions under the section 8(a) program is limited to determining whether applicable regulations have been followed and whether there has been fraud or bad faith on the part of government officials. Winfield Mfg., Co., Id.

A protester alleging bad faith by government officials bears a very heavy burden of proof. In order to show bad faith, a protester must offer irrefutable proof that an agency action was taken with the specific and malicious intent to injure the protester. Atlantic Petroleum Corp., B-215472., April 12, 1985, 85-1 CPD ¶ 417.

ISI alleges that EPA required ISI to subcontract with SCI Data Systems (SCI) for the performance of work under the contract. ISI contends that during contract performance, EPA's project officer interfered with its management of the subcontract by dealing directly with SCI and that the project officer steadily decreased ISI's management hours while increasing SCI's management hours, thereby effectively reducing ISI's control over its subcontractor and work performed under the contract.

ISI also contends that the EPA deliberately and, in bad faith, led ISI to believe that its contract performance was satisfactory and that ISI detrimentally relied on that belief. ISI asserts that if EPA found ISI's performance unsatisfactory, EPA was required to provide written notice by the Federal Acquisition Regulation, 48 C.F.R. § 46.407(g) (1984). ISI alleges that although EPA notified the SBA, in writing, of its dissatisfaction with ISI, ISI was not so notified.

In sum, ISI contends that EPA's failure to provide written notice of unsatisfactory performance, and the transfer of management hours to SCI provide evidence of the EPA project officer's malice and intent to damage ISI.

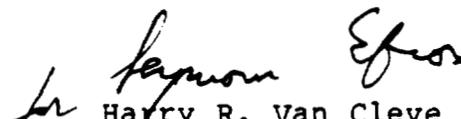
Although ISI alleges that it was provided with no written notice of EPA's dissatisfaction with its contract performance, the record indicates, and ISI does not deny, that at a number of meetings EPA expressed its concerns about the effect ISI's high personnel turnover rate was having on contract performance, and about the unacceptability of the Prime Implementation Plan, one of the tasks required by the contract. While written notice may not have been provided, the lack of such notice does not support ISI's contention that it reasonably relied on its belief that its contract performance was satisfactory.

With regard to the transfer of management hours, ISI has provided no evidence in support of its allegation that the project officer increased SCI's management hours with the specific intent to injure ISI. EPA refutes the allegation and states that SCI's total level of effort remained constant throughout contract performance. The record indicates that ISI utilized 20 employees to accomplish approximately 6.5 workyears of effort while SCI had a staff of five to accomplish approximately 5 workyears of effort. The project officer states that, at one point, ISI fired its entire middle management staff, including the program manager, and that ISI requested that EPA redirect its program manager workhours to other categories.

Where the only evidence on issues of fact is the conflicting statements of the protester and the contracting agency, the protester has not carried the burden of proving its case. Shaw Food Services Co., B-219415.2, Sept. 23, 1985, 85-2 CPD ¶ 320. Agency officials are presumed to be competent and to act in good faith, and we will not attribute improper motives on the basis of inference or speculation. P-III Associates, B-213856.2, July 31, 1984, 84-2 CPD ¶ 136. Moreover, we note that notwithstanding SBA's initial concerns with regard to the failure to consider ISI for the follow-on contract, SBA subsequently authorized EPA to negotiate with another firm for that 8(a) contract after EPA outlined the basis for its dissatisfaction with ISI's contract performance.

With regard to ISI's allegation that the EPA forced ISI to use SCI as a subcontractor, we note that ISI has also brought those allegations to the attention of the Offices of the Inspector General of the SBA and EPA. We therefore will not address those allegations. Although the record indicates that the EPA did work directly with SCI, ISI's subcontractor, there is insufficient evidence in the record to support a finding of bad faith.

The protest is denied.


Harry R. Van Cleve
General Counsel